Supreme Court, U.S.
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90-1562

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

S.J. GROVES & SONS COMPANY AND
JASPER CONSTRUCTION COMPANY,
Petitioners,
v.
FULTON COUNTY, GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Congress authorized the Department of Transportation ("DOT") to create regulations requiring state and local governments receiving federal funding to award fixed percentages of contract work on the basis of race or ethnic origin?

2. Whether strict scrutiny should be employed to determine whether regulations promulgated by DOT, which require state and local governments receiving federal funding to classify on the basis of race or ethnic origin, violate the equal protection component of the Fifth Amendment?

3. Whether Fulton County's 20% race-conscious set-aside program is subject to strict scrutiny?

LIST OF INTERESTED PARTIES

The following is a complete list of all parties with an interest in the outcome of this litigation.

Petitioners: S. J. Groves & Sons Company

Jasper Construction Company (Jasper Construction Company is a wholly owned subsidiary of S.J. Groves & Sons Company)

Respondent: Fulton County, Georgia

The United States Department of Transportation was a party in the district court and an appellant in the court of appeals. On September 18, 1989, the Eleventh Circuit dismissed the United States Department of Transportation pursuant to its motion for voluntary dismissal.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 920 F.2d 752 (11th Cir. 1991) and is reproduced in the Appendix to this petition at App 1a. The district court opinion is reported at 696 F. Supp. 1480 (N.D. Ga. 1987) and is reproduced in the Appendix to this petition at App. 1b. The district court's other orders are unpublished but are reproduced in the Appendix at App. 1c, 1d, and 1e.

JURISDICTION

The opinion and the judgment of the court of appeals were entered on January 7, 1991. This petition has been timely filed in accordance with Rule 13 of the Rules of this Court. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U. S. Const., Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Const., Amend. XIV, Sec. 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U. S. Const., Amend. XIV, Sec. 5:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 2000(d) (Title VI):

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 30 of the Airport and Airway Development Act of 1970, 49 U.S.C. § 2219:

> The Secretary shall take affirmative action to assure that no person shall, on the grounds of race, creed, color, national origin, or sex, be excluded from participating in any activity conducted with funds received from any grant made under this chapter. The Secretary shall promulgate such rules as the Secretary deems necessary to carry out the purposes of this section and may enforce this section, and any rules promulgated under this section, through agency and department provisions and rules which shall be similar to those established and in effect under title VI of the Civil Rights Act of 1964. The provisions of this section shall be considered to be in addition to and not in lieu of the provisions of title VI of the Civil Rights Act of 1964.

Part 23 - Participation by Minority Business Enterprise in Department of Transportation Programs, 49 C.F.R. §§ 23.01-23.55:

> The relevant DOT Regulations are reprinted in the Appendix at App. 1f.

O.C.G.A. § 36-10-2:

> Whenever it becomes necessary to build or repair any courthouse, jail, bridge, causeway, or other public works in any county, the county governing authority shall cause the same to be built or repaired by letting out the contract therefor to the lowest bidder, at public outcry, before the courthouse door, after having advertised the letting of the contracts, as provided in Code Section 36-10-3, provided that such county authorities shall have authority to reject any and all bids at the public letting. If, in their discretion, the public interest and economy require it, the county authorities may build or repair any public buildings, bridges, causeways, or other public property in the county by contract or sealed proposals, to be invited under the same provisions as to specifications and like information as are provided in Code Sections 36-10-3 and 36-10-4.

STATEMENT OF THE CASE

This action arose out of a runway resurfacing project at a Fulton County, Georgia, airport (the "airport project"). The County elected to apply to the Federal Aviation Administration ("FAA") for federal grant funds, pursuant to the Airport and Airway Development

Act of 1970, as amended ("AADA"). To comply with a condition of the FAA grant, the County prepared and submitted a minority business enterprise ("MBE") program (the "1982 Program"), pursuant to regulations which had been promulgated by the United States Department of Transportation ("DOT"), 49 C.F.R. § 23.1, *et seq*. Subpart C of the DOT Regulations, 49 C.F.R. § 23.41-§ 23.55 (the "DOT Regulations"), requires recipients of DOT financial assistance, such as the County, to implement an MBE program as a condition to the receipt of federal funds.[1] The DOT Regulations did not establish a

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[1] Subsection(g) requires grant recipients to establish percentage goals for the dollar value of work to be awarded to MBE's, including overall goals and goals on each specific prime contract. 49 C.F.R. § 23.45(g). Subsection(h) requires grant recipients to impose upon bidders the requirement that those bidders who do not meet the MBE contract goals must satisfy the recipient that the bidder has made "good faith efforts" to meet MBE goals. 49 C.F.R. § 23.45(h).

The DOT Regulations define minority as follows:

"Minority" means a person who is a citizen or lawful permanent resident of the United States and who is:

(a) Black (a person having origins in any of the black racial groups of Africa);

(b) Hispanic (a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race);

(c) Portuguese (a person of Portuguese, Brazilian, or other Portuguese culture or origin, regardless of race);

(d) Asian American (a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands); or

percentage goal for minority participation, but required grantees to do so.[2] The County's 1982 Program called for a goal of not less than 20% minority participation in the airport project.[3]

Groves[4] submitted the lowest responsive bid for the airport project, with an MBE participation component of 4.15%. The County, however, awarded the contract to

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(e) American Indian and Alaskan Native (a person having origins in any of the original peoples of North America).

(f) Members of other groups, or other individuals, found to be economically and socially disadvantaged by the Small Business Administration under section 8(a) of the Small Business Act, as amended (15 U.S.C. 637(a)).

49 C.F.R. § 23.5. "Minority business enterprise" or "MBE" is defined as "a small business concern . . . which is owned and controlled by one or more minorities or women." *Id.*

[2] This case does not involve a challenge to Subpart D of the DOT Regulations, which requires federal grant recipients to utilize "disadvantaged businesses" for not less than 10% of the dollar value of highway and urban mass transportation projects. 49 C.F.R. §§ 23.61, 23.63.

[3] The 20% MBE participation goal was the same percentage which the County had earlier required for all County contracts, regardless of the source of funding. *See* the County's Policy Statement contained in its 1982 Program (reproduced in the Appendix at App. 1g).

[4] Jasper and Groves are non-minority owned construction companies. Jasper is a subsidiary of Groves. Groves performed public construction work in the Fulton County, Georgia, area before December 1, 1982, when Groves assigned its rights and delegated its duties in existing contracts to Jasper. "Groves" will be used to refer to both Groves and Jasper collectively.

another bidder because Groves had not satisfied the required MBE percentage goals. Groves sued the County, contending that its rejection of Groves' bid violated Georgia's Low Bid Statute, O.C.G.A. § 36-10-2, and that the 1982 Program violated Title VI of the Civil Rights Act of 1964 and the equal protection clause of the Fourteenth Amendment. Jurisdiction in the district court was based on 28 U.S.C. §§ 1331 and 1332(a).

The district court determined that it could not rule on Groves' claims that the County's rejection of Groves' bid violated the Low Bid Statute and that the 1982 Program was unconstitutional without joining DOT to defend the DOT Regulations. The DOT was then joined as a party. Groves amended its Complaint to allege that the DOT Regulations violated the equal protection component of the Fifth Amendment.

On cross motions, the district court granted summary judgment for Groves, holding that: (1) the civil rights section of the AADA provided the requisite congressional authority to require racial preferences by a recipient of federal funds if such preferences were found necessary to remove or overcome the effects of past discrimination; (2) the DOT Regulations were not justified by a compelling governmental interest because DOT's findings of prior discrimination were inadequate; and (3) the DOT Regulations were not narrowly tailored because they did not provide adequate assurance that their application would be limited to accomplishing remedial objectives. *S.J. Groves & Sons Co. v. Fulton County*, 696 F. Supp. 1480, 1495 (N.D. Ga. 1987). Because the DOT Regulations were constitutionally invalid, they could not preempt Georgia's Low Bid Statute. Thus, the district

court found that Groves, as the low bidder, should have been awarded the contract for the airport project.

Fulton County and DOT brought an interlocutory appeal, which was stayed pending the Supreme Court's action in *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355 (4th Cir. 1987), *prob. juris. noted*, 484 U.S. 1058 (1988), *aff'd*, 488 U.S. 469 (1989), and *H.K. Porter Co. v. Metropolitan Dade County*, 825 F.2d 324 (11th Cir. 1987), *cert. granted*, 489 U.S. 1062 (1989). Following the Court's decision in *Croson*, the Eleventh Circuit granted DOT's motion to dismiss its appeal in this case. *See Groves*, 920 F.2d at 756 n.8.

The Eleventh Circuit decided that, under Georgia law, Fulton County had no authority to enact its MBE program and that the County could escape liability for violating the Low Bid Statute only if the DOT Regulations preempted Georgia law. *Groves*, 920 F.2d 752 (11th Cir. 1991).[5] The Eleventh Circuit rejected Fulton County's other defenses to the violation of the Low Bid Statute and examined the constitutionality of the DOT Regulations, upon which the County based its preemption defense. The Eleventh Circuit concluded that Section 30 of the AADA authorized the DOT to promulgate its Regulations which require grant recipients to establish set-aside programs. The Eleventh Circuit then attempted to "determine the proper standard by which to evaluate the constitutional validity of the DOT Regulations." *Id.* at 765. Acknowledging that "the resolu-

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[5] Groves does not intend to pursue its challenge to the County's 1984 MBE Resolution, which was rejected on standing grounds. 920 F.2d at 759.

tion of the proper standard to be applied to the DOT Regulations is difficult," the Eleventh Circuit concluded that "the district court, quite understandably, applied the incorrect standard." *Id.*

The Eleventh Circuit noted that in *Croson*, "a majority of the Court seemed to settle on a strict scrutiny standard for all government measures containing racial classifications." *Id.* at 766. "If *Croson* were the Supreme Court's latest word on this question, [the Eleventh Circuit probably would have agreed] that the district court, in applying the strict scrutiny standard to the DOT Regulations, had proceeded correctly." *Id.* However, citing the Court's recent decision in *Metro Broadcasting, Inc. v. FCC*, 110 S.Ct. 2997 (1990), the Eleventh Circuit concluded "that the district court erred in subjecting the Regulations to the more stringent strict scrutiny standard." 920 F.2d at 766. "Although the issue is hardly free of doubt, our reading of *Metro Broadcasting* leads us to conclude that the Supreme Court would utilize an intermediate level of scrutiny in evaluating the DOT Regulations." *Id.* The Eleventh Circuit remanded the case for reconsideration of the validity of the DOT Regulations under "intermediate" scrutiny.

REASONS FOR THE ALLOWANCE OF THE WRIT

SUMMARY.

This case presents the Court with important and unsettled issues of federal law. This Court should decide the standard of review to be employed in judging racial classifications mandated by a federal administrative agency. This case also presents the Court with an opportunity to determine the extent, if any, to which the

equal protection analysis of *Metro Broadcasting*, 110 S.Ct. 2997 (1990), will be applied in the context of public contracting. This case will also permit the Court to define the standard of review to be applied to local implementation of a federally-developed affirmative action program where specific percentage goals have not been established by either Congress or a federal agency.

By holding that Congress authorized the DOT to develop a race-conscious affirmative action program, the court of appeals decided the issue of congressional authority contrary to applicable decisions of this Court. Because the AADA does not contemplate the race-conscious DOT Regulations, they do not have the force and effect of law. Even if the DOT Regulations were authorized, Congress did not mandate a national race-conscious affirmative action program. Because no congressional mandate is involved, and it was an administrative agency (DOT) that required the County to implement its 1982 MBE Program, the court of appeals should have followed this Court's decisions in *Fullilove*, 448 U.S. 448 (1980), and *Croson*, 488 U.S. 469 (1989), and affirmed the district court's analysis of the DOT Regulations under strict scrutiny.

DISCUSSION.

1. *Because Congress Did Not Authorize The DOT Regulations, They Do Not Have The Force And Effect Of Law.*

Before addressing the constitutionality of the DOT Regulations, the Eleventh Circuit had to address the question of DOT's authority to create its MBE program. Although the answer was "not clear," the Eleventh

Circuit concluded that Congress authorized the DOT Regulations. 920 F.2d at 764.

Groves submits that the DOT Regulations exceeded the legislative authority pursuant to which they were promulgated. The DOT's exercise of quasi-legislative authority was not "rooted in a grant of such power by the Congress." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). Because the DOT Regulations lack congressional authorization, they lack the force and effect of law.

DOT identifies eight sources of authority for the DOT Regulations.[6] A cursory review of these sources reveals that only one source could even arguably authorize the DOT Regulations. *See Groves*, 920 F.2d at 764; *Groves*, 696 F. Supp. at 1483-84; *Central Alabama Paving, Inc. v. James*, 499 F. Supp. 629, 637-38 (M.D. Ala. 1980) (legislation "fall[s] far short of authorizing DOT to promulgate the MBE regulations which are here challenged").[7]

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[6] Sec. 905 of the Railroad Revitalization and Regulatory Reform Act of 1978 (45 U.S.C. 803); Sec. 30 of the Airport and Airway Development Act of 1970, as amended (49 U.S.C. 1730); Sec. 19 of the Urban Mass Transportation Act of 1964, as amended (Pub. L. 95-599); Title 23 of the U.S. Code (relating to highways and highway safety); Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*); The Federal Property and Administrative Services Act of 1949 (49 U.S.C. 471 *et seq.*); Executive Order 11625; Executive Order 12138.

Preface to 49 C.F.R. Part 23.

[7] In *M.C. West, Inc. v. Lewis*, 522 F. Supp. 338, 345 (M.D. Tenn. 1981), the court rejected all but Executive Order 11625 as authority for the DOT Regulations. *Id.* at 346. The district court in *Groves* found

The only possible source of authority for the DOT Regulations is Section 30 of the AADA.[8] The district court and the Eleventh Circuit erred in concluding that Section 30 of the AADA provided DOT with the requisite authority to promulgate the DOT Regulations.[9]

Section 30 of the AADA does not authorize the DOT Regulations because it is facially race-neutral. The words "affirmative action" are used in their generic sense and merely permit the DOT to take positive steps — to do things — to effectuate the purpose of Section 30 of the AADA and to prevent discrimination. There is a clear distinction between the generic use of the words "affirmative action," and the use of "affirmative action program" as a term of art.[10] Had the AADA authorized or

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unpersuasive the *West* court's reliance on the Executive Order. *See Groves*, 696 F. Supp. at 1483 n.5.

8 The Secretary shall take affirmative action to assure that no person shall, on the grounds of race, creed, color, national origin, or sex, be excluded from participating in any activity conducted with funds received from any grant made under this chapter. The Secretary shall promulgate such rules as the Secretary deems necessary to carry out the purposes of this section and may enforce this section and any rules promulgated under this section, through agency and department provisions and rules which shall be similar to those established and in effect under title VI of the Civil Rights Act of 1964.

49 U.S.C. § 2219.

9 *See Groves*, 920 F.2d at 764-65; *Groves*, 696 F. Supp. at 1483-85.

10 *Compare* 15 U.S.C. § 2622(b)(2) ("the Secretary shall order . . . the person who committed such violation to take affirmative action to abate the violation"); 12 U.S.C. § 1786(f)(1) ("the Board may issue a temporary order requiring the credit union . . . to cease and desist from

contemplated the DOT Regulations, it would have, at a minimum, plainly called for a race-conscious affirmative action *program*.

The Eleventh Circuit also erred by holding that the AADA endorses race-conscious rules by reference. 920 F.2d at 764-65. The relevant sentence provides:

> *The Secretary* shall promulgate such rules as the Secretary deems necessary to carry out the purposes of this section and *may enforce this section* and any rules promulgated under this section, *through agency and department provisions and rules which shall be similar to those established and in effect under title VI of the Civil Rights Act of 1964.*

49 U.S.C. § 2219 (emphasis added). Both lower courts stated that this language referred to a rule promulgated under Title VI which "does not prohibit" race-conscious affirmative action programs. *See* 49 C.F.R. § 21.5(b)(7) ("Subsection 7").[11]

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any violation or practice and to take affirmative action to prevent such insolvency, dissipation, condition, or prejudice pending completion of such proceedings") *with* 29 U.S.C. § 791(b) ("each department . . . shall . . . submit . . . an affirmative action program plan for the hiring, placement and advancement of individuals with handicaps") and 22 U.S.C. § 3901(b)(2) ("fostering the development and vigorous implementation of policies and procedures, including affirmative action programs").

[11] This part [Part 21] does not prohibit the consideration of race, color, or national origin if the purpose and effect are to remove or overcome the consequences of practices or impediments which have been restricted the availability of, or participation in, the program or activity receiving

Although Subsection 7 "does not prohibit" race-conscious action, the AADA does *not* incorporate or refer to Subsection 7. The AADA's reference to rules then in effect under Title VI is specifically addressed to regulations regarding *enforcement* of Title VI, and not to other, substantive regulations such as Subsection 7. The enforcement rules referred to in the AADA are set forth under "Procedures for Effecting Compliance." *See* 49 C.F.R. § 21.13 ("Subsection 13"). Carrying out its authority under the AADA, DOT promulgated Compliance and Enforcement Regulations (Subpart E) to address violations of the DOT Regulations, including Subparts C and D. 49 C.F.R. §§ 23.73-23.87.[12] The AADA's general reference to Title VI enforcement rules does not express any congressional intent to incorporate Subsection 7. The plain language of the AADA does not refer to, authorize,

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> Federal financial assistance, on the grounds of race, color, or national origin. Where prior discriminatory practice or usage tends, on the grounds of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this part applies, the applicant or recipient must take affirmative action to remove or overcome the effects of the prior discriminatory practice or usage.

49 C.F.R. § 21.5(b)(7) ("Subsection 7").

[12] As directed by the AADA, DOT promulgated rules to enforce the DOT Regulations by adopting earlier rules promulgated to enforce Title VI. For example, investigations are to be "made pursuant to prescribed DOT Title VI investigation procedures." 49 C.F.R. § 23.73(b). Moreover, enforcement proceedings "are conducted in accordance with the Department's procedures for enforcing Title VI (49 CFR Part 21)." 49 C.F.R. § 23.83(a).

or even contemplate the race-conscious affirmative action program required by the DOT Regulations.

Even if the Court accepts the Eleventh Circuit's conclusion that the AADA's reference to Title VI rules incorporates Subsection 7, the DOT Regulations are nonetheless without the force and effect of law. There cannot be requisite statutory authority for a regulation if the statute purportedly granting the authority refers to another regulation which itself is not legislatively authorized. *See Chrysler Corp.*, 441 U.S. at 303. Thus, if Congress did not authorize Subsection 7 under the Civil Rights Act of 1964, the AADA's reference to that rule cannot provide authority for the DOT Regulations.

Title VI, which is the only stated authority for Subsection 7,[13] does not authorize or contemplate that regulation. Title VI is a facially-neutral "thou-shalt-not-discriminate" statute. *Groves*, 696 F. Supp. at 1484.[14] The legislative history of Title VI does not reflect that Subsection 7 was authorized or even contemplated.[15]

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[13] *See* 49 C.F.R. § 21.1.

[14] "The tendency to turn the language of laws that require racial neutrality — thou-shalt-not-discriminate laws — into authority for granting racial preference is twisting the plain meaning of statutes too far. In a different era a similar jurisprudential approach could turn the same laws into weapons in the hands of persecutors." *West*, 522 F. Supp. at 345.

[15] *See generally* 110 Cong. Rec. 6543-47; 1964 U.S. Code Cong. & Admin. News 2355-2519. There is not even a suggestion in the legislative history that Title VI could be used by administrative agencies as a basis for implementing race-conscious affirmative action programs. *See* Minority Report upon Proposed Civil Rights Act of 1963, Committee

Thus, even if the AADA's reference to Title VI rules incorporates Subsection 7, the DOT Regulations are without the force and effect of law because Subsection 7 is unauthorized.

In the AADA, Congress did not make any of the determinations regarded as critical to the statutory MBE provision upheld in *Fullilove*. 448 U.S. at 468. The use of the words "affirmative action" in the AADA is insufficient to authorize the DOT Regulations. The AADA's reference to enforcement rules under Title VI excluded Subsection 7. Even if the AADA referred to Subsection 7, the DOT Regulations are still unauthorized because Title VI did not authorize Subsection 7.

2. *The Constitutionality Of A Racial Preference Program Developed By An Administrative Agency Should Be Judged Under Strict Scrutiny.*

This Court has addressed the constitutionality of governmental racial preference classifications in the public contracting arena twice before, and these two cases create a gap into which this case falls.[16] In *Fullilove*, the Court heard a facial challenge to a racial classification expressly mandated by Congress and discussed the standard of equal protection review applicable to congressional race-based remedial measures. *Fullilove* also examined the degree to which Congress may exercise its unique remedial powers under Section 5 of the Fourteenth Amendment. In *Croson*, the Court prescribed the

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on Judiciary Substitute for H.R. 7152, 1964 U.S. Code Cong. & Admin. News at 2431, 2453-55.

[16] *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

standard of review to be employed in determining the constitutionality of race-based remedies imposed by state or local governments.

In the more recent case of *Metro Broadcasting*, the Court reviewed certain minority preference policies of the Federal Communications Commission ("FCC") under an "intermediate" standard of review — whether the FCC minority preference policies serve an important governmental objective and whether they are substantially related to the achievement of that objective. *Metro Broadcasting* held that *Croson* did not prescribe the level of scrutiny to be applied to a racial classification employed by Congress and that "*Croson* cannot be read to undermine [the Court's] decision in *Fullilove*." 110 S.Ct. at 3009. Just as *Fullilove* turned on the fact that the set-aside program at issue was congressionally mandated, the Court in *Metro Broadcasting* found it to be "of overriding significance . . . that the FCC's minority ownership programs have been specifically approved — indeed, mandated — by Congress." *Id.* at 3008. The limited number of electromagnetic frequencies and the implication of First Amendment values also influenced the Court to relax the level of scrutiny under which the FCC's minority preference programs were analyzed.

In its decision, the Eleventh Circuit noted that "at least until 1989, no five members of the Supreme Court had agreed (at least in the same case) upon the proper standard for reviewing affirmative action programs." *Groves*, 920 F.2d at 765-66. In *Croson*, "a majority of the Court seemed to settle on a strict scrutiny standard for all government measures containing racial classifications." *Id.* at 766. Were it not for this Court's decision in *Metro*

Broadcasting, the Eleventh Circuit would have affirmed the district court's application of the strict scrutiny standard to the DOT Regulations. Although the Eleventh Circuit found that the issue was "hardly free of doubt," its reading of *Metro Broadcasting* led that court "to conclude that the Supreme Court would utilize an intermediate level of scrutiny in evaluating the DOT Regulations." *Id.* at 766.

Reading *Fullilove*, *Croson* and *Metro Broadcasting* together, the Eleventh Circuit held "that the Court has created a dual inquiry for evaluating affirmative action programs" and that there is a "clear demarcation between affirmative action programs developed by state and local governments and those developed at the direction of Congress." *Groves*, 920 F.2d at 767. According to the Eleventh Circuit, the first inquiry is to determine the source of an affirmative action program. If a state or local government has developed the program, a court must strictly scrutinize the program. However, if Congress has mandated an affirmative action program, "then an intermediate level of scrutiny is appropriate." *Id.*

Fullilove clearly distinguished an MBE program mandated by Congress from one developed by an administrative agency or by a local government. In *Fullilove*, a set-aside program under the Public Works Employment Act of 1977 (PWEA) was upheld against a facial challenge because Congress expressly mandated the 10% set-aside in the PWEA and Congress was owed deference in such matters due to its unique constitutional role in the enforcement of the post-Civil War

amendments.[17] Both the plurality opinion and Justice Powell's separate opinion in *Fullilove* note that Congress may legislate without making the same type of record and findings that are "appropriate to a judicial or administrative proceeding." *Fullilove*, 448 U.S. at 478, 502. In *Fullilove*, "Justice Powell made it clear that other governmental entities might have to show more than Congress before undertaking race-conscious measures: 'The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body.' [448 U.S.] at 515-516, n.14." *Croson*, 488 U.S. at 489. The teaching of *Fullilove* and *Croson* is that constitutionally acceptable means of redressing past discrimination vary with the powers of the governmental body enacting the legislation or promulgating the regulation.

Congress, unlike state and local legislative bodies or administrative agencies, is a national representative body which may legislate only upon the approval of both Houses and the concurrence of the President. Thus, Congress is more likely than other, more parochial, bodies to exercise its powers in ways that take into account the interests of all citizens. Additionally, Section 5 of the Fourteenth Amendment specifically empowers Congress

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[17] "Here we deal . . . not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." 448 U.S. at 483 (plurality opinion).

"to enforce, by appropriate legislation," the guarantee of equal protection set forth in Section 1 of that amendment. The reasons for giving greater deference to a congressional decision to establish a racial classification apply uniquely to Congress, and not to other components of the federal government

By contrast, an administrative agency such as DOT has no special competence or expertise in civil rights, and has no right to be accorded any greater deference than that afforded state and local governments. Neither *Fullilove* nor *Croson* nor *Metro Broadcasting* stand for the proposition that a federal administrative agency, acting under a general grant of authority to regulate a particular industry, is entitled to any special deference if it decides to classify on the basis of race. Although an administrative agency may "flesh out [the] skeleton, pursuant to delegated rule making authority," Congress itself must make the "critical determinations" regarding race-conscious programs. *Fullilove*, 448 U.S. at 468 (opinion of Burger, C.J.).[18]

Even if Congress had generally contemplated the DOT Regulations, Congress did not *mandate* a set-aside program of any type or in any fixed percentage. Further, in enacting the AADA, Congress made none of the determinations that the Court deemed to be "critical" in

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[18] *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 103, 114, n.46 (1976) (in light of discriminatory immigration policy, "it would be appropriate to require a much more explicit directive from either Congress or the President before accepting the conclusion that the political branches of Government would consciously adopt a policy raising the constitutional questions presented by this rule").

upholding the MBE provision challenged in *Fullilove*.[19] Neither Congress nor DOT mandated the 20% set-aside which Fulton County imposed on the airport project. Because the DOT is not entitled to any special deference, the DOT Regulations are subject to the strict scrutiny required by *Croson*.

3. *Metro Broadcasting Does Not Apply To Racial Preference Programs In Public Contracting.*

Under *Croson*, racial classifications in the public contracting arena should be viewed under the strict scrutiny standard to determine whether they pass constitutional muster. *Metro Broadcasting* does not require the DOT Regulations to be subjected to an intermediate scrutiny standard. In *Fullilove*, "six Members of the Court rejected intermediate scrutiny in favor of some more stringent form of review. Three Members of the Court applied strict scrutiny." *Metro Broadcasting*, 110 S.Ct. at 3032 (O'Connor, J., dissenting).[20] In addition, "*Fullilove* preceded [the Court's] determination in *Croson* that strict scrutiny applies to preferences that favor members of mi-

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[19] The following were deemed to be the critical determinations outlined in the PWEA: "the decision to initiate a limited racial and ethnic preference; the specification of a minimum level for minority business participation; the identification of the minority groups that are to be encompassed by the program; and the provision for an administrative waiver where application of the program is not feasible." 448 U.S. at 468.

[20] The plurality opinion in *Fullilove* specifically required any congressional race-conscious program to be "narrowly tailored" to achieve "the objective of remedying the present effects of past discrimination." 448 U.S. at 480. *See id.* at 490 ("Congress must proceed only with programs narrowly tailored to achieve its objectives").

nority groups, including challenges considered under the Fourteenth Amendment." *Id.*

Although Justice Stevens joined the opinion and the judgment of the Court in *Metro Broadcasting*, in a concurring opinion he indicated "that racial or ethnic characteristics provide a relevant basis for disparate treatment only in extremely rare situations." 110 S.Ct. at 3028 (Stevens, J., concurring). Justice Stevens stated that the minority preference policies of the FCC did not stigmatize either the favored or the disfavored class, and further stated that the case "falls within the extremely narrow category of governmental decisions for which racial or ethnic heritage may provide a rational basis for differential treatment." *Id.* In his concurring opinion in *Croson*, Justice Stevens noted that "race is not always irrelevant to sound governmental decision making. In the case of public contracting, however, if we disregard the past, there is not even an arguable basis for suggesting that the race of a subcontractor or general contractor should have any relevance to his or her access to the market." *Croson*, 109 S.Ct. at 731.

Justice Stevens' concurring opinions in *Croson* and *Metro Broadcasting* strongly indicate that *Metro Broadcasting* should not be applied to affirmative action programs in public contracting. Justice Stevens noted that, unlike the broadcasting context, affirmative action programs in the public contracting arena tend to stigmatize the preferred group and "exacerbate rather than reduce racial prejudice." 110 S.Ct. at 3028 and n.2 (Stevens, J., concurring) (citing *Fullilove*, 448 U.S. at 545 and n.17 and *Croson*, 488 U.S. at 516-17).

Justice Stevens' limiting language in *Metro Broadcasting* is appropriate because the bases upon which the Court upheld the FCC's minority preference policies in *Metro Broadcasting* are absent in the public contracting arena. First, the number of public contracting projects to be constructed with federal funds is virtually unlimited, compared to the limited number of broadcast licenses which can be awarded due to the scarcity of electromagnetic frequencies. Second, First Amendment principles are not implicated in public contracting. While diversity of views and information on the air waves may serve important First Amendment values, diversity for its own sake in public contracting does not serve any legitimate public interest. Rather, the interest to be served in public contracting is performance of the work by a qualified contractor at the lowest cost to the public.

4. *Implementation By Local Governments Of Racial Preference Programs Required by Federal Regulations Should Be Judged Under Strict Scrutiny.*

This Court has never considered the constitutionality of a state or local government's implementation of a federally-developed racial preference program in public contracting. *Fullilove* considered a facial challenge to an MBE program specifically mandated by Congress.[21] *Croson* involved a purely local set-aside program developed by the City of Richmond. The Court previously

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[21] In *Fullilove*, the Court noted that "the peculiarities of specific applications are not before us in this case. We are not presented here with a challenge involving a specific award of a construction contract or the denial of a waiver request; such questions as specific application must await future cases." *Fullilove*, 448 U.S. at 486.

granted certiorari in another case concerning local implementation of a federally-developed racial preference program. *H.K. Porter Co. v. Metropolitan Dade County*, 489 U.S. 1062 (1989), *granting cert. and vacating* 825 F.2d 324 (11th Cir. 1987). That case was remanded to the Eleventh Circuit for further consideration in light of *Croson*.

The Court's disposition of *Porter* suggests that five Justices would apply the strict scrutiny standard employed in *Croson* to local implementation of federally-developed racial preference programs.[22] In *Porter*, the congressional authority for Metropolitan Dade County's affirmative action plan was the Surface Transportation Assistance Act of 1978 ("STAA"). The STAA did not provide for an affirmative action program and did not require grant recipients to establish MBE goals in any set percentage.[23] Following STAA's enactment, the Urban Mass Transit Administration ("UMTA") of DOT required all state and local public bodies seeking federal financial assistance for the construction of highway and mass transportation projects to establish MBE affirmative action programs.

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[22] *Cf. Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 915 n.16 (D.C. Cir. 1989) (Silberman, J.), *rev'd. sub nom. Metro Broadcasting, Inc. v. FCC*, 110 S.Ct. 2997 (1990).

[23] By contrast, amendments to the STAA expressly established 10% contracting goals for "socially and economically disadvantaged individuals." *See* Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2100; Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No.100-17, § 106(c)(1), 101 Stat. 145. Regulations promulgated under these Acts presume that specified groups classified by race or ethic origin are socially and economically disadvantaged. *See* 49 C.F.R. § 23.62.

Rather than prescribing a methodology for applicants to follow in setting the required percentage goals, UMTA entrusted the goal-setting responsibility entirely with the state and local public bodies seeking the federal funding. Thus, it was Metropolitan Dade County which established the 5% MBE participation requirement.[24]

As in *Porter*, the statute arguably authorizing the DOT Regulations in this case does not require federal grant recipients to establish any fixed percentage goals for MBE participation. In fact, the AADA does not specifically authorize DOT to promulgate any race-conscious remedy. The DOT Regulations do not require federal grant recipients to establish MBE participation goals in any fixed percentage. It was Fulton County, rather than Congress or DOT, which imposed a goal of 20% minority participation as a part of its 1982 Program.[25] This was the

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[24] "[W]e are troubled by MDC's decision to use the 5% figure without supporting or substantiating the figure with some sort of consideration of the 5% goal to the relevant labor market of MBE's available to participate in contract Y-621." *H.K. Porter Co. v. Metropolitan Dade County*, 825 F.2d 324, 332 (11th Cir. 1987).

[25] The Policy Statement included in its 1982 Program provided that the County's policy was "to increase minority participation in all public contracts." *See* Policy Statement, reproduced in Appendix at 1g. The County selected its MBE goal at a time when over "half of its total population (589,904) [was] non-white or minority (303,509)." *See* Policy Statement. Three identified goals for the completion of the airport project were: "economy of costs; completion by a date certain and the active involvement of minorities." The Policy Statement further provided in part:

> Regarding the last goal, the county is interested in, and committed to, participation of minorities in ownership roles; (i.e., subcontracts) as opposed to having the minority

same percentage goal which Fulton County had already required for all County contracts.

Both *Fullilove* and *Croson* recognize that Congress' identification of a national problem does not provide a basis for implementing a race-conscious affirmative action program at the local level absent an additional showing that each local application is genuinely limited to those who have actually been harmed by prior local discrimination. Because national programs of the type analyzed in *Fullilove* must "explicitly recogniz[e] that the scope of the problem would vary from market area to market area," each locale must "identify the discrimination it seeks to remedy in its own jurisdiction." *Croson*, 488 U.S. at 504.

Chief Justice Burger's opinion in *Fullilove* stressed two factors in upholding the facial validity of the set-aside mandated by the PWEA. First, Congress was exercising its unique remedial powers under Section 5 of the Fourteenth Amendment. "The second factor emphasized by the principal opinion in *Fullilove* was the flexible nature of the 10% set-aside." *Id.* at 488.[26]

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participation goal being achieved through a prime contractor's staff, or the hiring of salaried minorities to perform the labor.

The County would prefer that the bidder strive for the largest feasible Minority Business Ownership Participation in all contracts and seek to achieve a goal of not less than twenty percent (20%) overall involvement of such firms.

[26] Two "congressional assumptions" which underlay the MBE program "could be 'rebutted' by a grantee seeking a waiver of the 10% requirement. *Id.* at 487-88, 100 S.Ct., at 2779-2780. Thus a waiver could be sought where minority businesses were not available to fill the 10%

Due to the facial nature of the challenge in *Fullilove*, the Court did not address questions of specific application of the statute, including the question of whether general congressional findings were sufficient to relieve a grantee of federal funds, such as the County, from establishing a legitimate basis for imposing an MBE set-aside in its own jurisdiction. *Metro Broadcasting* does not address the standard of scrutiny which should be utilized in analyzing a local government's implementation of an affirmative action program. Thus, even if the Court determines that the DOT Regulations are to be analyzed under less than strict scrutiny, the Court still needs to consider the standard of review to be applied to fixed percentage MBE programs established by local governments in the absence of any federal mandate or other directive.

The County's 1982 Program should be viewed under strict scrutiny. Otherwise, local governments such as the County could rely upon a general grant of authority to establish high percentage racial set-asides without establishing a compelling need to remedy prior discrimination and without narrowly tailoring the set-aside program to accomplish the remedial objective. In this case, the County cannot be viewed as an instrumentality of the federal government and cannot be accorded the deference that *Fullilove* and the Fourteenth Amendment reserve for Congress. *Fullilove* did not

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requirement or, more importantly, where an MBE attempted 'to exploit the remedial aspects of the program by charging an unreasonable price, *i.e.*, a price not attributable to the present effects of prior discrimination.' *Id.*, at 488, 100 S.Ct., at 2780. The Chief Justice indicated that without this fine tuning to remedial purpose, the statute would not have 'pass[ed] muster.'" *Croson*, 488 U.S. at 489.

specify the level of scrutiny to be applied to local implementation of a national MBE program, whereas *Croson* established that state and local governments' implementation of MBE programs must be analyzed under strict scrutiny. The Court should use this case to confirm that strict scrutiny is the standard by which any race-conscious preference program not specifically mandated by Congress will be judged.

CONCLUSION

The court of appeals erred in applying *Metro Broadcasting* in the context of public contracting and in holding that the DOT Regulations should be analyzed under "intermediate" scrutiny merely because federal regulations were involved. Congress did not authorize or require the DOT to develop a race-conscious affirmative action program to be imposed on all state and local government grantees of federal funds. Federal agencies and local governments are not entitled to the deference owed Congress in enforcing the equal protection guarantees of the Fourteenth Amendment. For the foregoing reasons, the requested writ of certiorari should issue and the judgment of the court of appeals should be reversed with respect to the issues raised in this petition.

Respectfully submitted,

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